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No. 373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SYLVANIA ELECTRIC PRODUCTS INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

and

LOCAL 352, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

and

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

JAMES W. HUNT
1615 H Street, N.W.
Washington, D. C.
Attorney for the Chamber of Commerce of the United States

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NATIONAL LABOR RELATIONS BOARD, ET AL.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Chamber of Commerce of the United States moves this honorable court for leave to file the attached brief as amicus curiae in the above entitled case.

Consent to this filing has been given by the Solicitor General in behalf of the National Labor Relations Board, the principal respondent and by counsel for Sylvania Electric Products, Inc., petitioner. Local 352, International Union of Electrical Workers, AFL-CIO, which was permitted to intervene in the Court of Appeals for the First Circuit has not consented.

The nature of the movant's interest, and its reasons for believing that the case presents issues of such nationwide interest that the court should grant a writ of certiorari are contained in the brief.

Respectfully submitted,

CHAMBER OF COMMERCE OF THE UNITED STATES
by its attorney,

JAMES W. HUNT
1615 "H" Street, N. W.
Washington, D. C. 20005

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

The Chamber of Commerce of the United States submits this brief as *amicus curiae* in support of the granting of the petition. This brief is filed with the consent of the Solicitor General.

The Chamber of Commerce of the United States (herein referred to as the Chamber) is an organization comprised of over 3,750 local, state and regional chambers of commerce and trade and professional associations. These groups and assoications, in turn have an underlying membership of approximately 4,500,000. In addition, the Chamber has a direct membership in excess of 32,000 corporations, firms and individuals.

STATEMENT OF POSITION

In the Chamber's view, there are two particularly ominous aspects of the court of appeals' decision, which will have significant and disruptive repercussions in the area of collective bargaining. The first is the erosion of the distinction drawn in *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, between mandatory subjects, about which the parties are obligated to bargain, and permissible subjects, about which the parties may or may not bargain as they see fit. The court of appeals has adopted instead the vague and unworkable standard that information pertaining to subject matter outside of the mandatory areas of "wages, hours, and other terms and conditions of employment" must nonetheless be disclosed if "necessary to effective agreement." Although we do not doubt that disclosure of innumerable types of information in the hands of either party might facilitate agreement—it would be helpful to an employer, for example, to know the size of a union's strike fund—it had heretofore been recognized that disclosure was compelled only with respect to the mandatory subject matter specified in Section 8(d) of the Act, or, under *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149, where a party was called upon to document a bargain-

ing claim. As it now stands in the light of the most recent *Sylvania* decision, wholly collateral matters may be converted to mandatory bargaining items if their discussion would facilitate the reaching of a collective bargaining agreement.

The second aspect that we find disturbing, a corollary of the first, is the broad obligation imposed by the court upon employers to divulge their costs to unions during the course of collective bargaining negotiations. *Truitt* decreed that an employer must furnish information regarding his financial position if he resists a wage demand of a union on the ground that his financial position is too bleak to meet it. The requirement of good faith bargaining, this Court said, necessitated that a party asserting a defense be willing to document it. The court of appeals in effect stands *Truitt* on its head, invoking an obligation on the part of an employer to disclose aspects of his financial position when it is the union—not the employer—which is broaching the claim. Hence the basic proposition underlying *Truitt* has been ignored.

If a union is entitled to cost information solely on the ground that with the information in its possession it may frame alternative wage demands—as is the case here—plainly no cost information is immune from union scrutiny. The practical effect of such an approach is to force an employer to open his books and records to a union whenever he happens to resist a wage demand, even though he does not resist on the ground of inability to pay.

REASONS FOR GRANTING THE WRIT

The court of appeals has, we believe, so blurred any distinction between mandatory and permissible subjects for bargaining as to impose upon a party to negotiations the obligation to confer—and hence, where necessary, to document its position—on any subject that might facilitate the reaching of an agreement. It had ruled out any contention that Sylvania had claimed that it was unable to pay the union's demands, and had reaffirmed its earlier finding that the costs in issue here were not wages and hence in themselves were not a mandatory subject of bargaining under the Act. The obligation to furnish cost information arose, we understand the court to say, solely because of the union's assertion that it might have elected to make an alternative proposal—for an hourly increase rather than a fringe benefit improvement—if it had possessed the information it sought.

Moreover, in no way was the information truly "necessary to effective agreement." Since the company had not claimed inability to pay, the union was free to present—for the company to consider on their merits—whatever alternative demands it wished. Hence bargaining was in no sense frustrated by the company's refusal to furnish the information. What the court really seems to be saying is that such information may have been a useful tool to the union in the conduct of its negotiations, and hence the obligation to disclose came into being.

The adoption of such a standard by the court of appeals is in flat conflict with the holding of this Court in *Borg-Warner*. Sections 8(a)(5) and 8(d) of the Act impose the obligation to bargain in good faith with

respect to "wages, hours, and other terms and conditions of employment." As this Court stated in Borg-Warner, 356 U.S. at 349:

> "The duty is limited to those subjects, . . . As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree."

Plainly the statutory limitations upon the areas of obligatory bargaining remain paramount. Bargaining need not, of course, be confined to mandatory subjects. "Effective negotiation" may well be enhanced by a party's willingness to discuss a wide range of subjects, even though not required by law to do so. *Borg-Warner* recognizes that there is a broad range of permissible subjects for bargaining, which the parties, despite the lack of any obligation to do so, may choose to explore. But the court of appeals has improperly converted permissible collateral subjects to mandatory ones, solely on the ground that negotiations would be more effective if the parties were compelled to confer about them. However, Congress made a policy decision to the contrary by its statement of the mandatory subjects for bargaining contained in Section 8(d).

Moreover, the imposition of so loose and unworkable a standard upon negotiations would inject a chaotic element into bargaining negotiations. There are a number of things a union might like to know, or areas it might wish to explore, in the preparation of its bargaining demands. A union might be interested in discouraging certain capital expenditures of a company on the theory, unsupportable though it may be, that the money would otherwise be spent on wage increases to employees. Or a union might hold the view that a

company would be a more profitable enterprise if it were to take on an additional line of products. Presumably if the union strenuously pressed either of these demands, a company's refusal to discuss them at all would contribute to a foundering of bargaining negotations. Under the court of appeals rationale is the potential collapse of negotiations under such circumstances enough to invoke a mandatory duty to confer? Under the established tests, clearly a company's capital investment and selection of products are wholly outside any compulsory area of bargaining or disclosure.

This entire area, however, has now been rendered uncertain by the court of appeals opinion, for the union in the above hypotheticals would certainly be in a position to frame alternative wage demands if a company refrained from investing in additional plant or equipment, or did develop a new line of products—even though such action by the company would be in no way "necessary" to the formulation of such demands. With no rule other than what is "necessary to effective negotiation"—a standard which may, for all we know, turn on the sincerity with which the union holds a belief or the adamance with which it advocates a position—the parties are trapped in a bargaining quagmire which can be resolved by nothing more substantial than *ad hoc* determinations of legality by the Board and courts.

The court of appeals decision, if permitted to stand, may well have its most severe impact in the sphere of disclosure of employer costs. Notwithstanding the court's assertion that employer costs in the case at bar did not constitute "wages" within the meaning of Section 8(d) of the Act, it is apparent that under the

court's rationale—that collateral information must be disclosed where "necessary to effective negotiation" —costs nonetheless must be disclosed whenever a *union* tailors its demands so as to put the *employer's* costs in issue.

This is a far cry indeed from the proposition enunciated in *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149 (1956) that an employer may be required to disclose his costs where the *employer's* own bargaining approach makes such costs relevant. As this Court noted in *Truitt*, 351 U.S. at 152, "If such an argument [inability to pay] is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." Plainly if an employer rejects a union demand on the ground that it may drive him out of business, bargaining is frustrated if the employer remains silent about the specifics of his claim, or if in the face of a union request to prove it, he refuses to document his position. Disclosure is mandatory under such circumstances because the cost information would, in the words of the Seventh Circuit in *United Fire Proof Warehouse Co.* v. *NLRB*, 356 F. 2d 494, 498, "provide the basis for mutual bargaining concessions occasioned by a common understanding of financial plight." Thus, disclosure under such circumstances is truly "necessary to effective negotiation," for bargaining cannot really progress without it.

The First Circuit's misconstruction of the *Truitt* rationale, however, places virtually no limitations upon the mandatory disclosure of costs, and seems to revive the notion explicitly repudiated in its earlier *Sylvania* decision that any cost saving to the employer is pre-

sumptively a wage increase to the employees. Then the court said, 291 F. 2d 128, 131:

> "Furthermore, inherent in the conclusion reached by the Board, as the trial examiner pointed out, is the inarticulate premise that any cost saving to an employer is presumptively an increase in the employees' wages. While no doubt employer costs affect wages, a direct relationship between them is at the best speculative, and not in accord with current business economy or business thinking. . . ."

Indeed, by focusing in this case upon the union's assertion that it might prefer to take in the form of an hourly rate increase whatever the cost to Sylvania of its proposed improvements in its pension and welfare plan, the court of appeals *sub silentio* adopted the view that the cost of an increase in fringes was automatically translatable into an increase in hourly rates.

But the court of appeals properly recognized in 1961 and at least ostensibly recognizes now, that there is not a direct relationship between costs and wages. Reduction in an employer's costs may or may not result in a more substantial wage increase than would otherwise be granted; nor does an increase in such costs, perhaps an investment in substantial capital improvements, necessarily result in a corresponding reduction in pay for employees. Moreover, a company may well be willing to grant increases in certain fringe benefits—as hospitalization or other medical coverage—on the theory that such a benefit is needed by the employee to prevent a serious drain on the employee's finances,

and yet not be willing to grant an hourly increase of a comparable amount.[1]

Yet if the relevance of costs to the collective bargaining process turns on the union's ability to alter its demands in the light of what it believes the employer's financial condition to be, irrespective of the employer's refusal to plead inability to pay the wage demands, as the court below seems to suggest, no information is immune from union scrutiny. The court's approach here is similar to that advanced by a union to the Court of Appeals for the District of Columbia Circuit and rejected by that court in *International Woodworkers of America* v. *NLRB,* 263 F. 2d 483, 485. The union had sought information concerning annual production of each of several employers and the related dollar value of their sales. The union's request, the Board had noted,[2] was based upon its desire to determine its wage demands and its intention to use the information it obtained to rebut an expected plea of inability to pay by the employers. The Board held that the information related to the financial status of the employers, but that such information, bearing as it did upon the employers' ability to afford a proposed wage increase, need not be divulged where no such issue was raised by the employers.

The District of Columbia Circuit approved this ruling. It stated, 263 F. 2d at 485:

> "Wages and hours are the heart and core of the employer-employee relationship, and information

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[1] This in fact is what happened in the case at bar. The union did request that the cost of the proposed improvements in the insurance and pension plans be added instead to wages. Sylvania rejected that proposal (JA 34).

[2] *Pine Industrial Relations Committee,* 118 NLRB 1055.

> concerning existing and part wage rates and patterns is essential to the union to enable it to bargain intelligently. This is not necessarily so with respect to what the employer's records show about how much, or at what cost, or in what time he produces his goods, and how or at what cost or in what volume he sells those products . . ."

The First Circuit's earlier *Sylvania* decision reflected the same philosophy. It stated, 291 F. 2d at 132:

> "Saying that it took the cost of its insurance into account in arriving at the 'level of benefits to be offered to the employees' is not the equivalent of saying that it would not consider changes in is insurance program on account of cost . . . [union] demands for other or more extensive coverage could be formulated without reference to cost and so could demands for an increase in cash wages."

The court now, however, would open the financial books and records of employers to unions on the unwarranted assumption that a union cannot formulate its demands without knowledge of the employer's costs, or more broadly, his financial situation as a whole. Such information, absent an employer's claim of inability to pay the union's demands, has not heretofore been thought "necessary to effective negotiation," and indeed it is not. Where the employer does not interpose cost as a defense, the union is plainly able to formulate its wage demands and to modify its wage demands without reference to their cost to the employer or the financial burden it places upon him. Information about the employer's financial condition, his wage costs or production costs, may be useful to a union. But to compel an employer to disclose his costs to a union on the theory that such information is *necessary* to a union

is to ignore the experience of the past thirty years. Collective bargaining has worked since 1935 without the broad disclosure that the court of appeals now tells us is necessary if effective negotiation is to take place.

Respectfully submitted,

JAMES W. HUNT
1615 H Street, N.W.
Washington, D. C.
Attorney for the Chamber of Commerce of the United States

Certificate of Service

I hereby certify that copies of this motion and the attached brief have been served upon

Thurgood Marshall, Esquire
Solicitor General
Department of Justice
Washington, D. C. 20530

Arnold Ordman, Esquire
General Counsel
National Labor Relations Board
Washington, D. C. 20570

Irving Abramson, Esquire
International Union of Electrical Workers
1126 Sixteenth Street, N. W.
Washington, D. C. 20006

Reilly and Wells
1120 Tower Building
Washington, D. C. 20005
(Counsel for petitioner)

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JAMES W. HUNT